# Pengarah Hospital Selayang & Ors v Ahmad Azizi bin Abdullah James & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-388 OF 2011
ABDUL MALIK ISHAK, APANDI ALIAND BALIA YUSOF JJCA
9 FEBRUARY 2012

*Civil Procedure — Striking out — Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 18 r 19 — Application to strike out plaintiff's writ of summons and statement of claim — Tortfeasors not named as defendants — Whether plaintiffs had the right to name whosoever as defendant — Whether plaintiffs failed to disclose reasonable cause of action — Whether plaintiff's claims scandalous, frivolous or vexatious of failed to comply Act*

The plaintiffs were the family members of one Sutini Yadi ('the deceased'). The deceased was eight months pregnant when she suffered from severe vaginal bleeding. She was referred to the maternity ward in Hospital Selayang at 4.30am. On the same day at 7.45pm, she was pronounced dead. The defendants denied that it was their negligence that caused the death. In 2007, the Director of the Hospital of Selayang and the Government of Malaysia were named as the first and third defendants respectively. The matter was then set for case management after pleadings were closed. By virtue of O 18 r 19 of the Rules of the High Court 1980 ('RHC'), the defendants filed their application to strike out the plaintiffs' writ of summons and statement of claim two years later. The application was dismissed by the High Court. In the present appeal, the defendants contended that the plaintiffs failed to disclose a reasonable cause of action against the defendants as the tortfeasors were not named as the defendants. It was argued that the plaintiffs' claims were scandalous, frivolous or vexatious and failed to comply with the provisions of ss 5 and 6 of the Government Proceedings Act 1956 ('the Act'). Further, the defendants averred that the plaintiffs' claim was an abuse of the process of the court. On the other hand, it was the plaintiff's case that they had the right to name whomsoever they alleged as defendants and that it would be up for determination of the court.

**Held**, dismissing the appeals with costs and affirming decision of court below:

(1) Nowhere did the defence aver that the first defendant was not the correct party. It was already too late when the defendants filed for striking out of the writ of summons and statement of claim as limitation has set in. The plaintiffs cannot amend their statement of claim to state the relevant doctors who were allegedly negligent in attending the deceased (see para 14).

(2) It was sufficient to name the first defendant as the head of the Selayang Hospital and in doing so; the defendants were not scandalous, frivolous or vexatious. Nor was it an abuse of the process of the court. The first defendant owed the deceased a duty of care, subject to proof, on behalf of the Selayang Hospital, for the negligent acts of all its staff, individually or collectively. Any breach of the duty of care by the staff in Hospital Selayang was vicariously imputed to the first defendant (see para 15).

(3) The complaint of the plaintiffs were not confined to negligence arising out of wrongful treatment but also for the negligent system of medical care and attention provided by the emergency section of the Hospital Selayang. Therefore, the first defendant was correctly cited as the party. On the available evidence, the plaintiffs had a reasonable cause of action against the defendants (see para 18).

**[Bahasa Malaysia summary**

Plaintif-plaintif merupakan ahli-ahli keluarga Sutini Yadi ('si mati'). Si mati sedang mengandung lapan bulan apabila dia mengalami pendarahan vagina yang banyak. Dia telah dirujuk ke wad bersalin di Hospital Selayang pada 4.30 pagi. Pada hari sama pada pukul 7.45 pagi, dia telah disahkan meninggal dunia. Defendan-defendan menafikan bahawa kecuaian mereka telah menyebabkan kematian itu. Pada tahun 2007, Pengarah Hospital Selayang dan Kerajaan Malaysia masing-masingnya telah dinamakan sebagai defendan-defendan pertama dan ketiga. Perkara ini kemudian ditetapkan untuk pengurusan kes setelah pliding ditutup. Menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), defendan-defendan telah memfailkan permohonan mereka untuk membatalkan writ saman dan penyataan tuntutan plaintif-plaintif dua tahun kemudian. Permohonan itu telah ditolak oleh Mahkamah Tinggi. Dalam rayuan ini, defendan-defendan berhujah bahawa plaintif-plaintif telah gagal menunjukkan kausa tindakan yang munasabah terhadap defendan-defendan kerana pelaku tort tidak dinamakan sebagai defendan-defendan. Adalah dihujahkan bahawa tuntutan-tuntutan plaintif-plaintif adalah penuh skandal, remeh atau menyusahkan dan gagal mematuhi peruntukan-peruntukan ss 5 dan 6 Akta Prosiding Kerajaan 1956 ('Akta tersebut'). Bahkan, defendan-defendan menegaskan bahawa tuntutan plaintif-plaintif adalah penyalahgunaan proses mahkamah. Sebaliknya, adalah kes plaintif bahawa mereka mempunyai hak untuk menamakan sesiapa yang mereka dakwa sebagai defendan-defendan dan bahawa ia akan ditentukan oleh mahkamah.

**Diputuskan**, menolak rayuan-rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Pembelaan tidak menegaskan bahawa defendan pertama bukan pihak yang betul. Ia adalah terlalu lewat untuk defendan-defendan memfailkan pembatalan writ saman dan penyataan tuntutan kerana had masa telah

luput. Plaintif-plaintif tidak boleh meminda penyataan tuntutan mereka untuk menyatakan doktor-doktor berkaitan yang didakwa telah cuai dalam merawat si mati (lihat perenggan 14).

(2) Adalah mencukupi untuk menamakan defendan pertama sebagai ketua Hospital Selayang dan dengan berbuat demikian; defendan-defendan tidak bersikap penuh skandal, remeh atau menyusahkan. Begitu pun ia bukan satu penyalahgunaan proses mahkamah. Defendan pertama mempunyai kewajipan berjaga-jaga terhadap si mati, tertakluk kepada bukti, bagi pihak Hospital Selayang, kerana perbuatan kecuaian kesemua stafnya, secara individu atau secara kolektif. Apa-apa pelanggaran kewajipan berjaga-jaga oleh staf di Hospital Selayang secara vikarius terletak pada defendan pertama (lihat perenggan 15).

(3) Aduan plaintif-plaintif tidak terbatas kepada kecuaian yang timbul daripada rawatan salah tetapi juga sistem rawatan dan perhatian perubatan yang cuai diberikan oleh seksyen kecemasan Hospital Selayang. Oleh itu, defendan pertama betul dinamakan sebagai satu pihak. Berdasarkan keterangan yang ada, plaintif-plaintif mempunyai kausa tindakan yang munasabah terhadap defendan-defendan (lihat perenggan 18).]

**Notes**

For a case on Rules of Court (Cap 322, R5, 1997 Rev Ed) O 18 r 19, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 7555.

**Cases referred to**

*Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor* [2007] 5 MLJ 552, CA (refd)

*Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717, CA (refd)

*Jamir Hassan v Kang Min* [1992] 2 MLJ 46, HC (refd)

*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1, FC (refd)

*Lau Chee Ching v Niah Native Logging Sdn Bhd* [2002] 4 MLJ 8, CA (refd)

*Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28, FC (refd)

*Loh Eng Leong & 2 Ors v Lo Mu Sen & Sons Sdn Bhd & Anors* [2004] 4 MLJ 384; [2003] 1 AMR 206, CA (refd)

*Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor* [1997] MLJU 245, HC (refd)

*MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd* [1999] 5 MLJ 42, HC (refd)

*Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215, HC (refd)

*Pacific Internet Ltd v Catcha.Com Pte Ltd* [2000] 3 SLR 26, HC (refd)

*Rosli bin Mohd Amin dan lain-lain lwn Pengarah Hospital Segamat dan lain-lain* [2011] 8 MLJ 441, HC (refd)

*Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, SC (refd)

**Legislation referred to**

Contracts Act 1950
Government Proceedings Act 1956 ss 5, 6
Rules of the High Court 1980 O 18 r 19

**Appeal from:** Suit No S–21–198 of 2007 (High Court, Kuala Lumpur)

*Nik Mohd Noor bin Nik Kar (Senior Federal Counsel, Attorney General's Chambers) for the defendants/appellants.*
*Mohan Ramakrishnan (Ramakrishnan & Associates) for the plaintiffs/respondents.*

**Abdul Malik Ishak JCA (delivering the ex tempore judgment of the court):**

**[1]** This is an ex tempore judgment of this court.

**[2]** We will refer the parties as the plaintiffs and the defendants like what they were referred to by the High Court.

**[3]** At the outset, the plaintiffs withdrew their claim against the second defendant (Kementerian Kesihatan Malaysia) and the High Court judge forthwith struck out the plaintiffs' claim against the second defendant.

**[4]** The defendants filed an application to strike out the plaintiffs' writ of summons and the statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('RHC') and under the inherent jurisdiction of the court. In due course, the High Court dismissed the defendants' application and they now appeal to this court.

**[5]** It is trite law that only in plain and obvious cases that recourse should be had to the summary process of striking out pleadings under O 18 r 19 of the RHC (per Abdul Hamid Omar CJ (Malaya) (later the Lord President of the Supreme Court) in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385, at p 386 (SC)).

**[6]** The power to strike out is a drastic power and should be exercised with utmost caution (per Lee Hun Hoe CJ (Borneo) in *Lee Nyan Choi v Voon Noon* [1979] 2 MLJ 28, at p 29 (FC)).

**[7]** Striking out will not be entertained in the following situations (the

categories are not closed and it will expand according to the factual matrix of each case):

(a) where the action contains a point of law which requires a serious argument, it is not appropriate to strike it out (*Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215);

(b) where it involves a complex case (*Pacific Internet Ltd v Catcha.Com Pte Ltd* [2000] 3 SLR 26);

(c) where the deed of settlement is challenged for being illegal, void and unenforceable and contrary to the Contracts Act 1950 (*Lau Chee Ching v Niah Native Logging Sdn Bhd* [2002] 4 MLJ 8 (CA)); and

(d) where it involves a minute examination of the documents tendered and a thorough examination of the relevant terms in the agreements between the parties (*MJC City Development Sdn Bhd v Everise Departmental Store Sdn Bhd* [1999] 5 MLJ 42).

**[8]** The facts of the present appeal concerned the death of Sutini Yadi after she received treatment in a government hospital. The plaintiffs being the family members of the deceased brought an action against the defendants. The writ of summons and the statement of claim dated 17 August 2007 named the Director of the Hospital Selayang and the Government of Malaysia as the first and third defendants respectively. The unconditional appearance and later the defence dated 27 june 2008 were filed by the attorney-general's chambers on behalf of the first and third defendants respectively. After pleadings were closed, the matter was then set for case management. The bundles of documents on both sides were filed. The plaintiffs' witness statements were also filed. Two years seven months and twenty-five days after filing their defence, the defendants filed their application to strike out the plaintiffs' writ of summons and the statement of claim. The delay must be construed adversely against the defendants. Although a party wishing to strike out the pleadings could do so 'at any stage of the proceedings', this does not give the party the right to adopt a lackadaisal attitude and sleep on their rights (*Loh Eng Leong & 2 Ors v Lo Mu Sen & Sons Sdn Bhd & Anors* [2004] 4 MLJ 384; [2003] 1 AMR 206). Moreover, it is always prudent to act promptly — at least before the close of the pleadings (*Jamir Hassan v Kang Min* [1992] 2 MLJ 46).

**[9]** The defendants' striking out application hinged on three main grounds, namely:

(a) that the plaintiffs failed to disclose a reasonable cause of action against the defendants by reason of the failure on the part of the plaintiffs to allude to the particulars of negligence against the tortfeasors who were not named as the defendants in the writ of summons and the statement of claim;

(b) that the plaintiffs' claims are scandalous, frivolous or vexatious and failed to comply with the provisions of ss 5 and 6 of the Government Proceedings Act 1956 ('the Act'); and

(c) that the plaintiffs' claims constitute an abuse of the process of the court.

**[10]** The defendants argue that in the statement of claim the plaintiffs named the Director of the Selayang Hospital as the first defendant and the Government of Malaysia as the third defendant. The defendants argue that the Director of the Selayang Hospital is not the person who treated the deceased Sutini Yadi and for that reason the plaintiffs had failed to comply with ss 5 and 6 of the Act.

**[11]** The plaintiffs submit that they had the right to file a claim against whomsoever they alleged they had a claim for negligence and whether they succeed would be up to the court to determine and decide. On 21 October 2006 at about 4.30am, the deceased Sutini Yadi was 37 years of age and was eight months pregnant and had severe vaginal bleeding and she was rushed to the emergency department of the Selayang Hospital. There she was referred to the maternity ward. At 7.45pm of the same day, her husband — the first plaintiff, was informed that the deceased Sutini Yadi had passed away. The cause of death was listed as 'primary postpartum haemorrhage with dissemination intravascular coagulation'. The defendants deny that the death of Sutini Yadi was caused by their negligence.

**[12]** The first defendant — the Director of the Selayang Hospital, takes charge of and is responsible for all the medical personnel there. All the surgeons, doctors and nurses are under the charge of the first defendant.

**[13]** Paragraph 9 of the statement of defence of the first defendant and the third defendant reads as follows (see pp 40–41 of the appeal record):

> 9 Lanjutan dari Perenggan 7 Pembelaan, Defendan Pertama dan ketiga menegaskan bahawa segala rawatan ke atas si mati oleh Defendan Pertama dan Ketiga dan/atau pengkhidmat dan/atau agennya telah dilaksanakan mengikut amalan kemahiran serta penjagaan yang munasabah serta mengikut amalan perubatan yang diterima pakai di hospital itu pada masa berkenaan. Seterusnya, Defendan Pertama dan Ketiga menyatakan bahawa:
>
> (a) bahawa si mati telah diletak di bawah pengawasan, pemerhatian serta penjagaan yang berterusan dari waktu si mati dimasukkan ke wad;
>
> (b) bahawa segala tindakan yang perlu telah diambil untuk si mati melahirkan dengan keadaan yang selamat;
>
> (c) keadaan 'atonic uterus' akibat dari Placenta Praevia Type 4 dan juga komplikasi DIVC yang dialami telah merumitkan pembedahan yang dijalankan ke atas si mati;

(d) tidak terdapat kelengahan dan kelewatan dalam memberi rawatan dan jagaan dari segi perubatan kepada si mati pada setiap masa yang material.

**[14]** And the averments in para 9 of the statement of defence of the first defendant and the third defendant show that the first defendant is in charge of all the surgeons, doctors and nurses in the Selayang Hospital. And these hospital personnel are the agents of the first defendant who attended to the deceased Sutini Yadi at the material time.

**[15]** No where did the defence aver that the first defendant — the Director of the Selayang Hospital, was not the correct party. And when the defendants filed the summons in chambers to strike out the writ of summons and the statement of claim, it was done too late in the day. Now, limitation has set in and the plaintiffs cannot amend their statement of claim to cite the relevant doctors who were purportedly negligent in attending to the deceased Sutini Yadi.

**[16]** The plaintiffs submit that they did not file an affidavit in reply in response to the defendants' application to strike out because the issue raised was one of law, not factual. And at that time, according to the plaintiffs, the plaintiffs did not know the duties of the first defendant — the Director of the Selayang Hospital.

**[17]** According to ss 5 and 6 of the Act, the tortfeasors must be named and that the government should not be the primary defendant in the suit (*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1 (FC); and *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717 (CA)). But, according to the plaintiffs, the names of the doctors were not known at the time of the filing of the writ of summons and the statement of claim. Even the defendants in their statement of defence did not state the names of the doctors. In our judgment, it is sufficient to cite the first defendant as the national head of the Selayang Hospital. In *Rosli bin Mohd Amin dan lain-lain lwn Pengarah Hospital Segamat dan lain-lain* [2011] 8 MLJ 441, a medical negligence case, the parties agreed that the defendant, who was represented by the attorney-general's chambers, was 100% liable for the injuries sustained by the plaintiffs there. Likewise here, naming the Director of the Selayang Hospital as the first defendant is not scandalous, frivolous or vexatious. Neither is it an abuse of the process of the court. In our judgment, the Director of the Selayang Hospital owes the deceased Sutini Yadi a duty of care, subject to proof, on behalf of the Selayang Hospital for the negligent acts of all its surgeons, doctors and nurses working in that Hospital individually and collectively. And this duty of care, subject to proof, is vicarious in the sense that any breach of this duty of care by any surgeon, doctor or nurse working in the Selayang Hospital is vicariously imputed to the director of that hospital.

**[18]** Paragraph 17 of the statement of claim recites in extenso the negligence and the breach of contract on the part of the defendants. The particulars of the negligence and the breach of contract of the defendants are itemised from paras 17.1–17.20 of the statement of claim. The complaint of the plaintiffs is not confined to negligence arising out of wrongful treatment but also for the 'negligent system of medical care and attention' provided by the emergency section of the Selayang Hospital. That being the case, the Director of the Selayang Hospital is the correct party to be cited as the first defendant (*Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan a/l Kanapathipillai) v Dr Goon Siew Fong & Anor* [2007] 5 MLJ 552 (CA), at p 556). This is certainly not a plain and obvious case for striking out (*Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor* [1997] MLJU 245). On the available evidence, the plaintiffs do have a reasonable cause of action against the defendants.

**[19]** For these brief reasons, we unanimously dismiss the appeals of the defendants with costs of RM10,000 here and below. We affirm the decision of the High Court. The case should proceed to trial within this year to its final conclusion.

*Appeals dismissed with costs and decisions of court below affirmed.*

Reported by Ibnu Aswan